1999

# Ryan Q. Hodges v. Reese S. Howell : Brief of Appellee

Utah Court of Appeals


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**IN THE UTAH COURT OF APPEALS**

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| RYAN Q. HODGES, an individual,<br><br>Plaintiff and Appellant,<br><br>vs.<br><br>REESE S. HOWELL, an individual, and SALT LAKE MORTGAGE CORPORATION, a Utah corporation,<br><br>Defendants and Appellees.<br><br>REESE S. HOWELL,<br><br>Third-Party Plaintiff,<br><br>vs.<br><br>LINDA M. HODGES<br><br>Third-Party Defendant. | **BRIEF OF APPELLEE REESE S. HOWELL**<br><br>Appeal No. 990606-CA<br>District Court No. 980910505<br><br>Priority No. 15 |

Appeal from the Third Judicial District Court of
Salt Lake County, State of Utah
The Honorable Homer F. Wilkinson, District Judge, Presiding

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## STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1998) (cases transferred to the Court of Appeals from the Supreme Court). The Supreme Court's jurisdiction was based on Utah Code Ann. § 78-2-2(3)(j) (1998) (appeals from judgments of Utah state district courts over which Court of Appeals lacks original jurisdiction).

## ISSUES PRESENTED FOR REVIEW

Appellee Reese S. Howell ("Mr. Howell") agrees that this Court may properly review the issues of (1) whether the trial court correctly applied a one-year statute of limitations to Appellant Ryan Q. Hodges' ("Mr. Hodges'") alienation of affections claim, and (2) whether the trial court correctly concluded that there is no genuine factual dispute that Mr. Hodges' claim accrued more than one year before he filed suit.

Mr. Howell disagrees, however, with Mr. Hodges' assertion that this Court should review the trial court's alleged failure to make "findings of fact" supporting its summary judgment ruling that Mr. Hodges' alienation of affections claim accrued more than one year before he filed his Complaint. The trial court is not required to make any findings of fact when ruling on motions (and indeed should not "find" facts in the summary judgment context), thus making this issue improper for appellate review. See Utah R Civ. P. 52(a); AMS Salt Industries v. Magnesium Corp., 942 P.2d 315, 320 (Utah 1997) (holding that

findings of fact are unnecessary in connection with summary judgment decisions). Moreover, Mr. Hodges has raised this issue for the first time on appeal. Mr. Hodges never made a motion or otherwise objected to the trial court about the adequacy of its "findings of fact," and the issue is therefore waived. See, e.g., Utah R. Civ. P. 46 (requiring objections at the trial-court level to preserve issues for appeal); State v. Allen, 839 P.2d 291, 302 (Utah 1992) (declining to address adequacy of trial court's findings of fact and conclusions of law regarding Miranda ruling because the issue was raised for the first time on appeal).

Mr. Howell therefore submits that the following is a more accurate statement of the issues presented in this appeal than is the statement contained in Mr. Hodges' brief.

**ISSUE #1.**

Was the trial court correct when it determined that the one-year statute of limitations contained in Utah Code Ann. § 78-12-29(4) applies to alienation of affections claims?

Mr. Howell agrees with Mr. Hodges that the interpretation of a statute of limitations is a question of law, which is reviewed for correctness. See Julian v. State, 966 P.2d 249, 252 (Utah 1998); Gramlich v. Munsey, 838 P.2d 1131, 1132 (Utah 1992).

**ISSUE #2.**

Was the trial court correct when it determined, based on Mr. Hodges' own deposition testimony, that there was no genuine factual dispute that Mr. Hodges' alienation of affection claim against Mr. Howell accrued more than one year before he filed suit?

The trial court's determination in the summary judgment context that no genuine dispute of material fact exists is reviewed for correctness. See Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989).

## DETERMINATIVE PROVISIONS ON APPEAL

This appeal turns exclusively upon the interpretation of Utah Code Annotated, section 78-12-29(4) (1996). Section 78-12-29 provides:

An action may be brought within one year:

> (1) for liability created by the statutes of a foreign state;
>
> (2) upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation;
>
> (3) upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state;
>
> (4) for libel, slander, assault, battery, false imprisonment, or seduction;
>
> (5) against a sheriff or other officer for the escape of a prisoner arrested or imprisoned upon either civil or criminal process;

> (6) against a municipal corporation for damages or injuries to property caused by a mob or riot;
>
> (7) on a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act;
>
> (a) Subsection 25-6-5-(1)(a), which in specific situations limits the time for action to four years, under Section 25-6-10; or
>
> (b) Subsection 25-6-6(2).

(Emphasis added).

Section 78-12-25(3) is only applicable if this Court reverses the trial court and determines that Mr. Hodges' alienation of affections claim is not governed by the one-year limitations provision for seduction. Section 78-12-25 provides:

> An action may be brought within four years:
>
> (1) upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or material furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received;
>
> (2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1);

(3) for relief not otherwise provided for by law.

There are no other provisions, statutes, ordinances, rules or regulations determinative of the issues presented for review.

## STATEMENT OF THE CASE

Mr. Hodges filed a Complaint against Mr. Howell on October 20, 1998, asserting that Mr. Howell alienated the affections of Mr. Hodges' then-wife, Linda Hodges ("Ms. Hodges"),[1] seeking compensatory damages as a result.[2] (R. at 1-6.) Mr. Howell thereafter moved for summary judgment on the basis that Mr. Hodges' alienation of affections claim was barred by the applicable statute of limitations, Utah Code Ann. § 78-12-29(4) (1996). (R. at 162-64.) The trial court granted Mr. Howell's motion and dismissed Mr. Hodges'

---

[1] Linda Hodges is now married to Mr. Howell. For convenience of the Court, however, she will be referred to herein as Ms. Hodges, as she was so designated before the trial court.

[2] Mr. Hodges also asserted a claim against Salt Lake Mortgage Company, Mr. Howell's employer, alleging that Salt Lake Mortgage Company was vicariously liable for Mr. Howell's action. That claim was dismissed by the trial court for failure to state a claim upon which relief could be granted on March 8, 1999. (R. at 104-05.)

Complaint in its entirety, based on the memoranda filed by the parties and pertinent deposition testimony from Mr. Hodges. (R. at 210-13; Br. of Appellant at App. A.)

## STATEMENT OF FACTS

The "Statement of Facts" set forth in Mr. Hodges' brief (Br. of Appellant at 7-10) is replete with argumentative, ad hominem attacks on Mr. Howell that contain no citations to the record, are in fact unsupported by the record, and are irrelevant to this appeal. Moreover, Mr. Hodges' "Statement of Facts" merely paraphrases the deposition testimony of Mr. Hodges that was placed before the trial court, and counsel's innocuous paraphrasing misleadingly blunts Mr. Hodges' actual testimony, which Mr. Howell presented to the trial court verbatim. To correct these misleading aspects of Mr. Hodges' Brief, Mr. Howell submits that the following Statement of Facts more fairly and accurately reflects the undisputed facts that were presented to the trial court.

1. According to the Complaint, Mr. Hodges married his former wife, Linda Merritt Hodges, on April 14, 1983, and Ms. Hodges remained "deeply attached" to Mr. Hodges until approximately October of 1995. (R. at 2.)

2. Mr. Hodges explained in his deposition that in approximately October 1995, he learned of Ms. Hodges' relationship with Mr. Howell and realized at that point that Ms. Hodges was no longer in love with him:

> Q. Let's look at the first sentence of Paragraph 9 [of your Complaint]. It says, quote, from April 14th, 1983 until approximately October of 1995, Linda M. Hodges was deeply attached to her husband, plaintiff Ryan Hodges. Do you see that sentence?
>
> A. Uh-huh.
>
> * * * *
>
> Q. Why October 19, 1995 [sic]?[3] How did you pick that date?
>
> A. I think – I think that's probably before or during her employment briefly, and that's when we kind of felt things went -- she started hanging out with Reese and those types of things. Spending more time at the bar than she was at home.
>
> Q. So that's approximately the time you think . . . that your wife fell out of love with you?
>
> A. Yeah, from that point on, yeah.

(R. at 152-54; Dep. of Mr. Hodges at 254:2 - 256:1 (emphasis added).)

3. Approximately one year later, Mr. Hodges and Ms. Hodges separated for a period of two to three months—from sometime in October 1996 until approximately Christmas of 1996. (R. at 140-41; Dep. of Mr. Hodges at 158:25 - 159:8.)

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[3] The Complaint merely refers to "October of 1995," and there does not appear to be any reference in either the Complaint or the deposition transcript to the specific date of "October 19, 1995." This appears to be either a transcription error by the reporter or a misstatement by the examining attorney.

4. During this period of separation, Mr. Hodges was aware that Ms. Hodges spent time with Mr. Howell, and Mr. Hodges considered Mr. Howell to be Ms. Hodges' "boyfriend" at that time. Mr. Hodges admitted this in his deposition when describing an incident that occurred the night before Thanksgiving of 1996:

> Q. Do you remember another Salt Lake Mortgage employee outting [sic] at the Ashbury Pub where Reese and Linda were there?
>
> * * * *
>
> A. Yeah, I found them at the bar together when we were separated.
>
> * * * *
>
> Q. Were you upset?
>
> A. Yeah.
>
> Q. Why were you upset?
>
> A. You know, it was the night before Thanksgiving, the kids were home alone. . . . And she's out drinking with her boyfriend. Instead of saying, hey, Ryan, why don't you come get the kids. And I asked her to step outside and we went outside and started talking and she didn't want to talk and I grabbed her by the shoulders and said, you need to talk to me. . . .
>
> Q. So it was the night before Thanksgiving and you said she's out drinking with her boyfriend?
>
> A. Yeah.

Q. At that point in time, did you think of Reese as her boyfriend?

A. More or less, yeah.

* * * *

Q. (BY MR. CHRISTIANSEN) So just so the record is clear, this was the Thanksgiving in 1996?

A. Uh-huh.

Q. That's a yes?

A. Yes.

(R. at 146-48; dep. of Mr. Hodges at 217:10-219:16 (emphasis added)).

5. Mr. Hodges and Ms. Hodges reconciled briefly around Christmas of 1996. (R. at 140; Dep. of Mr. Hodges at 158:21-24.)

6. During this brief reconciliation, Mr. And Mrs. Hodges attended marriage counseling. (R. at 153-54; dep. of Mr. Hodges at 153:7-154-4).

7. Mr. Hodges and Ms. Hodges separated again, for the final time, on the following Martin Luther King Day, which fell on January 20, 1997. (R. at 141; Dep. of Mr. Hodges at 159:12-18.) Mr. Hodges moved out of the house on that date (R. at 144-45; Dep. of Mr. Hodges at 162:21 - 163:3), and Mr. Hodges and Ms. Hodges never lived together in the same house after that. (R. at 149; Dep. of Mr. Hodges at 236:7-14.)

8. Although Mr. Hodges subjectively hoped that Ms. Hodges might have a change of heart and work to save the marriage (R. at 144-45; Dep. of Mr. Hodges at 162:10 - 163-8), he conceded in his deposition that he knew on January 20, 1997, that his marriage was not going to work out:

> Q. Did there come a point when you realized it wasn't going to work out?
>
> A. Yeah, Martin Luther King Day.
>
> Q. And how did you know at that point that the marriage wasn't going to work out?
>
> A. We had -- before we reconciled, we had given each other lists of things that weren't appropriate and we had to work and/or not do, and one of those was, hey, you know, don't hang out with Reese.
>
> Q. And in your view, did Linda not honor that --
>
> A. Yeah, she didn't honor that in terms of going to lunch with him and what have you.
>
> Q. And so you knew by Martin Luther King Day that you two were going to get divorced?
>
> A. On that day, yeah. Not before.
>
> Q. Why that day?
>
> A. I just, you know, called to take her to lunch and she wasn't around and so I went to her office and she pulled in with Reese, and we were done.
>
> MR. NIELSEN:

For my clarification, are we talking -- and I think we are -- '97, Martin Luther King Day?

THE WITNESS:

Yeah.

(R. at 142-44; Dep. of Mr. Hodges at 160:3 - 161:3 (emphasis added)).

9. Shortly after their final separation, Ms. Hodges filed for divorce from Mr. Hodges in approximately January of 1997. (R. at 4.)

10. Ms. Hodges and Mr. Hodges decided to put their family home up for sale during the first three months of 1997 (R. at 150; Dep. of Mr. Hodges at 237:9-23), and the house sold in May or June of 1997. (R. at 151; Dep. of Mr. Hodges at 238:3-8.)

11. Mr. Hodges admits that at the end of his marriage to Ms. Hodges, he knew that she was in love with Mr. Howell. (R. at 139; Dep. of Mr. Hodges at 150:3-12.)

12. Six months after Mr. Hodges and Ms. Hodges finally separated on January 20, 1997 (i.e., in July of 1997), Mr. Hodges had moved on and had become involved in a romantic relationship with a woman by the name of Cindy Hill. (R. at 138; Dep. of Mr. Hodges at 140:6-23.)

13. Mr. Hodges did not file his Complaint in this case until October 20, 1998. (R. at 1-6.)

14. Ms. Hodges and Mr. Howell were married on June 11, 1999.

## SUMMARY OF THE ARGUMENT

The trial court correctly held that Mr. Hodges' alienation of affections claim is barred by the one-year limitations provision in Utah Code Ann. § 78-12-29(4) (1996), which applies, among other things, to "seduction." That statute applies in this case because Mr. Hodges' alienation of affections claim essentially alleges that Mr. Howell "seduced" Ms. Hodges. The unmistakable similarity and overlap between claims such as alienation of affections claims and seduction has convinced other jurisdictions to conclude that all causes of action arising from alleged interference with marital relations—whether it be alienation of affections, seduction, or criminal conversation—are governed by the same statute of limitations. See, e.g., Loomer v. Rittinger, 789 S.W.2d 16 (Ky. Ct. App. 1990); Plummer v. Summe, 687 S.W.2d 543 (Ky. Ct. App. 1984); Skaggs v. Stanton, 532 S.W.2d 442 (Ky. Ct. App. 1975); Tofte v. Tofte, 12 Cal. App. 2d 111, 54 P.2d 1137 (Cal. Dist. Ct. App. 1936); Harp v. Ferrell, 115 Cal. App. 160, 300 P. 978 (Cal. Dist. Ct. App. 1931). In like fashion, the Utah Supreme Court has instructed that the appropriate analysis of similar statute of limitations issues is to determine whether the claim at issue and the claim specified in a particular statute of limitations involve the same basic alleged violation of the plaintiff's rights. If so, the statute of limitations applies. Tolman v. K-Mart Enter. of Utah, Inc., 560 P.2d 1127, 1128 (Utah 1977). Under this analysis, Mr. Hodges' allegations are unambiguously based on an alleged act of "seduction" by Mr. Howell, as that term has been

defined under Utah law, and are accordingly subject to the one-year limitations provision contained in section 78-12-29(4).

Furthermore, the statute of limitations begins to run on a claim for alienation of affections when the love and affection are finally lost. Retherford v. AT&T Communications, 844 P.2d 949, 975 (Utah 1992). It is a matter of undisputed fact that Ms. Hodges' affections for Mr. Hodges were "finally lost" for statute of limitations purposes no later than the couple's final separation on January 20, 1997, twenty-one months before Mr. Hodges filed his Complaint. This is the date that Mr. Hodges identified as the date when he knew his marriage was over and that the two would get divorced. (R. at 142-43 Dep. of Mr. Hodges at 160:3-161:3.)[4] Although Mr. Hodges may have held out some hope, in his own mind only, that Ms. Hodges would have a change of heart, the objective facts demonstrate that after January 20, 1997, Ms. Hodges made absolutely no attempt to reconcile with Mr. Hodges and was instead dedicated towards developing her relationship with Mr. Howell, which culminated with their marriage on June 11, 1999.

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[4] Moreover, between January 20, 1997 and October 28, 1997 (one year before Mr. Hodges filed his Complaint), Ms. Hodges filed for divorce from Mr. Hodges, the couple sold their family home, and Mr. Hodges began seeing other women.

## ARGUMENT

## I. THIS COURT SHOULD AFFIRM THE ORDER OF THE TRIAL COURT DISMISSING MR. HODGES' COMPLAINT WITH PREJUDICE AS BARRED BY THE STATUTE OF LIMITATIONS.

The trial court correctly dismissed Mr. Hodges' alienation of affections claim as barred by the statute of limitations. That claim is governed by the one-year limitations provision contained in section 78-12-29(4) of the Utah Code. The trial court's dismissal was therefore appropriate because Mr. Hodges delayed in filing his Complaint in this case until approximately nine months after the one-year limitations provision had expired.

### A. The One-Year Statute of Limitations Set Forth in Section 78-12-29(4) Applies to Mr. Hodges' Alienation of Affections Claim.

Mr. Hodges' alienation of affections claim against Mr. Howell is governed by the one-year statute of limitations that applies to many intentional torts under Utah law, including "libel, slander, assault, battery, false imprisonment, or seduction." Utah Code Ann. § 78-12-29(4) (1996) (emphasis added). This one-year statute applies to any claims arising out of Mr. Howell's alleged seduction of Ms. Hodges, including Mr. Hodges' claim for alienation of affections. Contrary to Mr. Hodges' argument, simply because the tort of alienation of affections is not specifically included in the list of intentional torts under section 78-12-29(4) does not mean that the limitations provision does not apply. Rather, as the Utah Supreme Court recognized in Tolman v. K-Mart Enterprises of Utah,

Inc., 560 P.2d 1127, 1128 (Utah 1977), interpreting the very same statute, the solution to this problem "is found in looking to the basic nature of the alleged violation of the plaintiff's right." Accordingly, the Court in Tolman held that a claim of "false arrest" was subject to the one-year statute of limitations for claims of "false imprisonment" contained in section 78-12-29(4), even though "false arrest" was not specifically included in the language of the limitations provision. Although the claims at issue in Tolman are different than those in the instant case, the principle is the same: claims based on the same basic violation of the plaintiff's rights are subject to the same statute of limitations, regardless of how the claims are labeled.

Mr. Hodges relies, in part, on Olsen v. Hooley, 865 P.2d 1345 (Utah 1993), wherein the Utah Supreme Court held that because a cause of action for intentional infliction of emotional distress was not subject to a specific statutory limitations period, the four-year "catch-all" provision applied. Unlike this case and the Tolman case, however, the Olsen case simply did not address whether the claim in question was sufficiently related to, or based upon, another claim and that it should be governed by the other claim's specific statute of limitations. Accordingly, this case is appropriately subject to the method of analysis set forth in Tolman. The Olsen case is inapposite. Similarly, cases from other jurisdictions that merely apply "residual" or "general" statutes of limitations to alienation of

affections claims are not helpful in resolving the issue before this Court, considering that Utah law does include a specific statute of limitations referring to "seduction."

1. Mr. Hodges' Claim Is Based Upon Alleged Acts of Seduction.

An analysis of the allegations in Mr. Hodges' Complaint demonstrates unmistakably that his alienation of affections claim is based upon alleged acts of seduction and is therefore properly subject to the statute of limitations for seduction. Such similarities have appropriately convinced courts from other jurisdictions presented with this issue to conclude that all causes of action arising from alleged interference with marital relations—such as alienation of affections, seduction, and criminal conversation—are governed by the same statute of limitations. See, e.g., Loomer v. Rittinger, 789 S.W.2d 16 (Ky. Ct. App. 1990) (holding one year statute of limitations for criminal conversation applied to claim for alienation of affections rather than five year residual provision); Plummer v. Summe, 687 S.W.2d 543, 544 (Ky. Ct. App. 1984) (holding that one year statute of limitations for criminal conversation applies to all claims based on the interference with the marital relationship); Skaggs v. Stanton, 532 S.W.2d 442 (Ky. Ct. App. 1975) (same); Rheudash v. Clower, 270 S.W.2d 345 (Tenn. 1954) (holding one year statute of limitations for criminal

conversation and seduction also applied to alienation of affections claim)[5]; Tofte v. Tofte, 12 Cal. App. 2d 111, 54 P.2d 1137 (Cal. Dist. Ct. App. 1936) (holding one year limitations provision for "seduction or for injury to . . . one caused by the wrongful act or neglect of another. . . ." rather than residual limitations provision applies to alienation of affections claim); Harp v. Ferrell, 115 Cal. App. 160, 300 P. 978 (Cal. Dist. Ct. App. 1931) (same).

Mr. Hodges' attempts to distinguish the two claims are based on flawed logic. First, Mr. Hodges seems to imply that liability for seduction is criminal only. Thus, because there was nothing criminal about the relationship between Ms. Hodges and Mr. Howell, he argues that the statute of limitations for seduction cannot apply. This is not a pertinent distinction, however, because a meritorious seduction claim can, in fact, give rise to civil liability under Utah law. See Utah Code Ann. § 78-11-4 & -5 (1996) (providing that a plaintiff may recover damages under claim of seduction).

Second, Mr. Hodges contends that seduction is distinct from alienation of affections because seduction necessarily involves an act of sexual intercourse, an element not always shared by alienation of affections claims. Although acts of sexual intercourse are not required in order to establish a viable claim for alienation of affections, the fact remains that

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[5] The Tennessee Supreme Court later abolished the torts of alienation of affections and criminal conversation outright. See Hanover v. Ruch, 809 S.W.2d 893 (Tenn. 1991).

most alienation of affections claims do indeed involve allegations of sexual intercourse. See Jackson v. Righter, 891 P.2d 1387 (Utah 1995); Norton v. Macfarlane, 818 P.2d 8 (Utah 1991); Nelson v. Jacobson, 669 P.2d 1207 (Utah 1983). Indeed, Mr. Hodges' alienation of affections claim in this very case prominently features as its centerpiece an allegation that Mr. Howell had a sexual relationship with Linda Hodges while she was still married to Mr. Hodges. (R. at 4-5.)

Furthermore, this distinction (sexual intercourse as a necessary element) is irrelevant in light of the Utah Supreme Court's discussion of another similar claim, criminal conversation, that the Court abolished in Norton v. Macfarlane, 818 P.2d 8 (Utah 1991). Like seduction, an action for criminal conversation necessarily involves an act of sexual intercourse. Norton, 818 P.2d at 16. The Utah Supreme Court abolished the tort, however, reasoning that "the law provides an adequate remedy [through an alienation of affections action] when the marital bonds and relational interests are damaged by illicit sexual intercourse." Id. at 17. Thus, the tort "is unnecessary and should be abolished as a tort separate and apart from the overlapping tort of alienation of affections." Id. (emphasis added). Because the Utah Supreme Court has expressly acknowledged in Norton the "overlap" of claims involving damages to marital bonds and relational interests, the

Supreme Court's Tolman analysis dictates that all such claims should be subject to the same one-year statute of limitations.

Courts from other jurisdictions have similarly recognized the inherent "overlap" between those causes of action, and have specifically held on the basis of that overlap that all causes of action alleging interference with the marriage relation—whether denominated as criminal conversation, alienation of affections, or seduction—are subject to the same statute of limitations. See, e.g., Loomer v. Rittinger, 789 S.W.2d 16 (Ky. Ct. App. 1990); Plummer v. Summe, 687 S.W.2d 543 (Ky. Ct. App. 1984); Skaggs v. Stanton, 532 S.W.2d 442 (Ky. Ct. App. 1975); Rheudash v. Clower, 270 S.W.2d 345 (Tenn. 1954); Tofte v. Tofte, 12 Cal. App. 2d 111, 54 P.2d 1137 (Cal. Dist. Ct. App. 1936); Harp v. Ferrell, 115 Cal. App. 160, 300 P. 978 (Cal. Dist. Ct. App. 1931).[6] The court in Skaggs v. Stanton specifically addressed this precise issue, holding that the express one-year statute of limitations for criminal conversation (rather than the residual "catch-all" limitations

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[6] Professor Prosser makes this identical point by stating:

> Criminal conversation, enticement and alienation of affections still are often treated as separate torts, but there is no good reason for distinguishing them. They represent three forms of interference with aspects of the same relational interest, and of course all three may be present in the same case.

Prosser, Handbook of the Law of Torts, §124, at 876-77 (4th ed. 1971).

provision) applied to all actions founded on interference with the marriage relation. In so holding, the court reasoned:

> The five year statute is the catchall statute of limitations which applies to injuries not arising upon contract and not otherwise enumerated. The one year statute specifically mentions and applies to criminal conversation. We are of the opinion that when the legislature chose to specifically mention criminal conversation in the one year statute it evidenced a legislative intent that the one year statute apply to all actions founded on interference with the marriage relation [including criminal conversation, enticement and alienation of affections].

Id. at 443 (emphasis added). As a result, the mere fact that sexual intercourse is an element of seduction does not remove Mr. Hodges' alienation of affections claim from the ambit of the one-year statute of limitations.

Furthermore, the fact that there was no "trickery, deceit, fraud or artifice" in Mr. Howell's actions toward Ms. Hodges is immaterial as neither seduction nor alienation of affections requires such acts to sustain either claim. Even if such acts were required, Mr. Hodges repeatedly alleges in his Complaint that Mr. Howell employed "contrivances" to accomplish his alleged alienation of Linda Hodges' affections. (R. at 3-5.) "Contrive" is defined to mean such things as "to bring about by artifice," "to invent or fabricate," and "to plot or scheme." Webster's II New Riverside University Dictionary, 306 (1988). This definition of contrive is virtually identical to the Utah Supreme Court's definition of

seduction contained in Bowers v. Carter, 59 Utah 249, 250-51, 202 P.2 1093, 1094-95 (Utah 1921), quoted on page 14 of Mr. Hodges' Brief. Thus, contrary to Mr. Hodges' assertions, he has essentially alleged (though Mr. Howell denies) that Mr. Howell employed "trickery, deceit, fraud, or artifice" in allegedly seducing Ms. Hodges away from him.

Finally, Mr. Hodges contends that an alienation of affections claim is more akin to a wrongful death claim than to a seduction claim. Accordingly, because both claims might involve the loss of "society, love, companionship, protection and affection," Norton, 818 P.2d at 11-12, Mr. Hodges argues that this mere similarity in the nature of the alleged harm caused by the two torts should alone afford him at least as much time to pursue his alienation of affections claim as a plaintiff has to pursue a wrongful death claim. Although the alleged harm may be similar in certain circumstances, the nature of the alleged wrongdoing is entirely different in an alienation of affections case than in a wrongful death case. As discussed above, Mr. Hodges' alienation of affections claim is, in fact, essentially one for seduction, not wrongful death. Although both alienation of affections and wrongful death claims may protect similar interests, the conduct of Mr. Howell that Mr. Hodges has alleged in support of his alienation of affections claim is far more closely aligned with seduction than wrongful death. Mr. Hodges has not alleged that anyone has "wrongfully died" in this case, but he has most assuredly alleged that Ms. Hodges was "seduced." Mr

Hodges' alienation of affections claim is therefore subject to the one-year statute of limitations for claims involving seduction.

### B. There Is No Genuine Dispute of Fact That Ms. Hodges' Affections for Mr. Hodges Were Finally Lost More Than One Year Before Mr. Hodges Filed His Complaint.

The undisputed facts of this case—taken exclusively from Mr. Hodges' own Complaint and deposition testimony—demonstrate as a matter of law that Ms. Hodges' affections for Mr. Hodges were finally lost no later than January 20, 1997, one year and nine months before Mr. Hodges filed his Complaint. In deciding the date when the limitations period begins to run on a claim for alienation of affections, "courts have determined the statute of limitations begins to run when the alienation is accomplished, i.e., when love and affection are finally lost." Retherford v. AT&T Communications, 844 P.2d 949, 975 (Utah 1992) (making this observation by analogy in deciding when the limitations period commences on a claim for intentional infliction of emotional distress). Courts applying this standard have consistently held as a matter of law that the statute of limitations begins to run when "some overt act takes place, showing want of affection or loss of consortium." Flink v. Simpson, 305 P.2d 803, 804 (Wash. 1957) (holding that wife's alienation of affections claims accrued, for statute of limitations purposes, when her husband moved out of her home into a hotel room, after which he did not return or make any attempt at reconciliation). See also Strode v. Gleason, 510 P.2d 250, 254 (Wash. App.

1973) (holding that alienation of affections claim was time-barred because the period preceding the limitations period "was replete with acts which put the plaintiff on notice of her harm").

Numerous categories of objective manifestations can evidence the loss of a spouse's affections and cause the limitations period to accrue, and there is nothing in the law that operates to toll the limitations period until the parties are finally divorced. Indeed, "[d]ivorce by itself has never been considered a pivotal event in alienation of affections cases. . . ." Loomer v. Rittinger, 789 S.W.2d 16, 17 (Ky. Ct. App. 1990) (holding that one-year statute of limitations barred wife's claim for alienation of affections as a matter of law because she did not file her claim until fifteen months after learning that her husband had renewed his illicit relationship with defendant, although claim was filed only nine months after wife's divorce from husband became final). As one court has explained:

> There is often difficulty in determining when a spouse has suffered the loss of affection in the narrow sense. The loss must be evidenced by objective manifestations. It may be evidenced by a refusal of cohabitation, by separation, or divorce, or any other conduct on the part of the spouse which indicates a diminution of the regard of one spouse for the other. . . . [W]hen a judgment of divorce is entered, it is clear that from that time on the spouse is legally deprived of the enjoyment of the marital status. But this does not mean the accrual of a right of action for alienation of affections may not take place prior to separation or the judgment of divorce.

Fischer v. Mahlke, 18 Wis. 2d 429, 434-35, 118 N.W.2d 935, 938-39 (1963) (emphasis added).

Mr. Hodges' alienation of affection claim had unquestionably accrued by January 20, 1997 at the latest, but he did not file his Complaint until October 20, 1998—a full twenty-one months later. Mr. Hodges knew that his wife fell out of love with him beginning as early as October 1995, allegedly as a result of her involvement with Mr. Howell. (R. at 152-54; Dep. of Mr. Hodges at 254:21 - 256:1.) He also knew that when he and Ms. Hodges separated for a two-to-three-month period at the end of 1996, Mr. Hodges considered Mr. Howell to be Ms. Hodges' "boyfriend." (R. at 146-48; Dep. of Mr. Hodges at 217:10 - 219:8.)

Mr. Hodges further testified that when he and Ms. Hodges separated for the final time on January 20, 1997, he knew on that date that they would get divorced. (R. at 142; Dep. of Mr. Hodges at 160:17-19.) Mr. Hodges testified that he and Ms. Hodges never lived in the same house after that, that Ms. Hodges filed for divorce from him several days later, that they sold the family home in May or June of 1997, and that he knew Ms. Hodges was in love with Reese Howell toward the end of their marriage. (R. at 142-43; Dep. of Mr. Hodges at 160:3 - 161:3.) Finally, Mr. Hodges acknowledged that he was also involved in a romantic relationship with another woman by July of 1997 (i.e., six months after his final

separation from Ms. Hodges, and fifteen months before he filed his Complaint). (R. at 117; Dep. of Mr. Hodges at 140:18-23.)

Any one of the foregoing incidents was arguably sufficient, in and of itself, to start the limitations period running on Mr. Hodges' alienation of affections claim, and all of these events occurred more than a year before Mr. Hodges filed his Complaint in this case, which he did not do until October 20, 1998. When considered together, and in light of the legal authority discussed above, these undisputed facts leave absolutely no doubt that Mr. Hodges knew that Ms. Hodges' affections toward him were "finally lost" no later than January 20, 1997. Thus, his Complaint is at least nine months late, and the trial court correctly held that Mr. Hodges' alienation of affections claim against Mr. Howell is time-barred.

Mr. Hodges attempts to confuse this issue, arguing that a factual dispute exists because he testified in his deposition that he believed, apparently in his own mind only, that his marriage was salvageable until his divorce became final in February 1998. (R. at 143-45; Dep. of Mr. Hodges at 162:17 - 163:8.) Mr. Hodges' pure speculation that his wife might try to salvage their marriage does not, however, create a genuine dispute of fact. To establish a genuine dispute of fact, "the nonmovant must do more than simply show there is some metaphysical doubt as to the material facts." Ulissey v. Shvartsman, 61 F.3d 805, 808

(10th Cir. 1995) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).

In the instant case, the objective facts are undisputed that at no time after January 20, 1997, at the very latest, did Ms. Hodges exhibit any intent to reconcile. In fact, as demonstrated above, all evidence is to the contrary. Thus, although Mr. Hodges subjectively may have hoped that someday, somehow, Ms. Hodges might have a change of heart and attempt to reconcile, this "metaphysical doubt" is not enough to create a genuine factual dispute over when Mr. Hodges was on notice that Ms. Hodges' affections were lost. Rather, the objective record evidence undisputedly demonstrates that Ms. Hodges' affections for Mr. Hodges were finally lost at least twenty-one months prior to the expiration of the one-year limitations period. The undisputed facts of this case, considered in light of the persuasive law on this issue, leave no doubt that Mr. Hodges' claim against Mr. Howell is time-barred.

## II. THE TRIAL COURT DID NOT ERR IN DECLINING TO MAKE DETAILED FINDINGS OF FACT WHEN IT HELD THAT MR. HODGES' COMPLAINT WAS TIME-BARRED.

The trial court did not err when it declined to make findings of fact supporting its holding that Mr. Hodges' Complaint was barred by the one-year statute of limitations because findings of fact are not necessary to support a trial court's summary judgment rulings. Mr. Hodges erroneously relies on Rule 52(a) of the Utah Rules of Civil Procedure,

which states that "in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." Utah R. Civ. P. 52(a) (emphasis added). Actions decided on summary judgment are not "tried upon the facts" to anyone, and Rule 52(a) is accordingly inapplicable.

Moreover, even if that were not clear enough, Rule 52(a) expressly provides (and Mr. Hodges neglects to mention) that "[t]he trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b) [governing involuntary dismissals]." Id. Utah courts have consistently acknowledged that "findings of fact are unnecessary in connection with summary judgment decisions." AMS Salt Ind. v. Magnesium Corp., 942 P.2d 315, 320 (Utah 1997); Mountain States, Elec. v. Atkin Wright & Miles, 681 P.2d 1258, 1261 (Utah 1984); Taylor v. Estate of Taylor, 770 P.2d 163, 168 (Utah Ct. App. 1989). As the Court in Taylor explained, "[i]f summary judgment is proper under Utah R. Civ. P. 56, the material facts are, by definition, undisputed and there are no facts which the court has to find." Taylor v. Estate of Taylor, 770 P.2d at 168 (emphasis in original). The trial court therefore was not required to provide any "findings" in support of its ruling. The trial court did exactly what it was supposed to do under the circumstances, holding in its Order and Final Judgment that "Plaintiff's claim is time-barred because there is no genuine factual dispute that the alienation of affection to the Plaintiff in this case

occurred more than one year prior to October 28, 1998, the date the Complaint was filed." (R. at 211.) Rule 52(a) does not require anything more, and the trial court's summary judgment should be affirmed.

## CONCLUSION

The trial court correctly determined that Mr. Hodges' Complaint was barred by the statute of limitations. The one-year limitations provision for seduction in Utah Code Ann. section 78-12-29(4) applies to Mr. Hodges' alienation of affections claim, because this claim is based upon an alleged act of seduction. Additionally, because the undisputed facts demonstrate that Ms. Hodges' affections toward Mr. Hodges were finally alienated more than one year prior to the date Mr. Hodges filed his Complaint, his claim against Mr. Howell is time-barred. Finally, the trial court was not required to issue findings of fact supporting its holding that Mr. Hodges' Complaint was time-barred. Consequently, this Court should affirm the trial court's order dismissing Mr. Hodges' alienation of affections claim as barred by the statute of limitations.

DATED this 14th day of January, 2000.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2000, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing **BRIEF OF APPELLEE REESE S. HOWELL**, to:

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